IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

1) EVANSTON INSURANCE COMPANY, INC., an Illinois Corporation, Plaintiff,	)	
v.	)	Case Number: CIV-12-1244-HE
1) DNA SOLUTIONS, INC., an Oklahoma Corporation; 2) DR. CRAIG DAVID SHIMASAKI, an individual; 3) DR. THOMAS KUPIEC, an individual; 4) DR. BRANDT CASSIDY, an individual; and 5) BEUS GILBERT, PLLC, an Arizona Professional Limited Liability Company; Defendants.	)	

COMPLAINT FOR DECLARATORY RELIEF

COMES NOW the Plaintiff, Evanston Insurance Company, Inc. ("Evanston"), and hereby submits this Complaint requesting this Court issue a Declaration and relief pursuant to 28 U.S.C. § 2201 and 2202. For its Complaint, Evanston alleges and states as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Evanston Insurance Company, Inc., is a corporation incorporated under the laws of Illinois with its principal place of business in a state other than Oklahoma, Arizona or Utah.

2. Defendant DNA Solutions, Inc. ("DNAS"), is a corporation incorporated

under the laws of Oklahoma with its principal place of business in Oklahoma and, therefore, is a citizen of Oklahoma.

3. Defendant Dr. Craig David Shimasaki ("Dr. Shimasaki") is a citizen of Oklahoma.

4. Dr. Thomas Kupiec ("Dr. Kupiec") is a citizen of Oklahoma.

5. Defendant Brandt Cassidy ("Dr. Cassidy") is a citizen of Oklahoma.

6. Defendant Beus Gilbert, PLLC ("Beus Gilbert") is a Professional Limited Liability Company organized under the laws of Arizona and is an unincorporated association. On Evanston's knowledge and belief, all members of Beus Gilbert are citizens of Arizona.

7. The amount in controversy in this suit is in excess of $75,000.00, as the underlying counterclaim for negligence, breach of contract, fraud, and punitive damages alleged by Beus Gilbert against DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy, described below, exceed $75,000.00.

8. Plaintiff has complete diversity of citizenship and the amount in controversy in this action is in excess of $75,000; therefore, jurisdiction is proper in this suit under 28 U.S.C. §1332.

9. Underlying this matter is a transaction and ongoing litigation occurring within the jurisdiction of the United States District Court for the Western District of Oklahoma; therefore, venue for this action is proper in this Court, pursuant to 28 U.S.C. § 1391.

II. FACTS AND CIRCUMSTANCES

10. Defendant Beus Gilbert has made a counterclaim and third-party claim against Defendants DNAS, Dr. Shimasaki, Dr. Kupiec, and Dr. Cassidy, arising out of a transaction that is described more fully in *(1) DNA Solutions, Inc., an Oklahoma Corporation, Plaintiff, v. Beus Gilbert, PLLC, an Arizona professional limited liability company; Defendant/Counterclaimant, (1) Beus Gilbert, PLLC, an Arizona professional limited liability company, Third Party Plaintiff, v. (1) Dr. Brandt Cassidy, an individual, (2) Dr. Thomas Kupiec, an individual; and (3) Dr. Craig Shimasaki, an individual, Third Party Defendants*, Case No. CIV-11-965-R, in the U.S. District Court for the Western District of Oklahoma ("the underlying action").

11. Beus Gilbert's claim in the underlying action alleges losses Beus Gilbert, a law firm, sustained in connection with a case filed in the U.S. District Court for the District of Utah ("the Utah litigation"), wherein Beus Gilbert represented plaintiffs Brigham Young University ("BYU") and Dr. Daniel Simmons (" Dr. Simmons").

12. Evanston has issued a liability insurance policy, numbered SM-882480 ("the Policy"), listing DNAS as the Named Insured and, by way of endorsement, adding Dr. Shimasaki as an Additional Insured. As is more particularly set forth below, the Policy provides that Evanston will defend and indemnify DNAS, its employees, and Dr. Shimasaki, to the extent the Policy applies to the claim(s) alleged.

13. The counterclaim brought by Beus Gilbert does not allege or claim a "Professional Personal Injury" as that phrase is defined by the Policy.

14. DNAS had knowledge of the facts that could result in Beus Gilbert's claim

against it before the Policy's inception date.

15. DNAS did not provide timely notice of Beus Gilbert's claim as was required under the Policy.

III. THE POLICY

16. The Policy's **INSURING AGREEMENT** states that Evanston Insurance Company, Inc.,

> shall pay on behalf of the Insured all sums in excess of the Deductible amount … which the Insured shall become legally obligated to pay as Damages as a result of Claims first made against the Insured during the Policy Period … and reported to the Company pursuant to Section Claims A., Claim Reporting Provision, for Professional Personal Injury by reason of any act, error, or omission in Professional Services rendered … and arising out of the conduct of the Insured's Professional Services provided:
>
> A. the act error or omission happens during the Policy Period or on or after the Retroactive Date…; and
>
> B. prior to the effective date of this policy the Insured had no knowledge of such act, error, or omission or any fact, circumstance, situation or incident which may result in a Claim under this policy.

(Exhibit "1,", the Policy, p. 1, attached hereto and incorporated herein.)

17. The Policy's Declarations page states the Policy Period began October 1, 2011, and runs until October 1, 2012. (Exhibit "1.")

18. The Policy provides that Evanston "shall have the right and duty to defend and investigate any claim to which coverage under this policy applies." (Exhibit "1," p. 4.)

19. The Policy defines the following relevant terms:

> **DEFINITIONS**
> […]

B. **Claim** means a demand received by the Insured for monetary damages or services and shall include the service of suit or institution of arbitration proceedings against the Insured.

[…]

D. **Damages** means the monetary portion of any judgment, award or settlement; provided, however, Damages shall not include: (1) punitive or exemplary damages….

E. **Professional Personal Injury** means:

1. any bodily injury, mental injury, sickness, disease, emotional distress or mental anguish, including death resulting therefrom of any patient, person or resident of a healthcare facility receiving Professional Services;

2. false arrest, detention or imprisonment, or malicious prosecution except when inflicted by, at the direction of, or with the consent or acquiescence of the Insured who has predetermined to commit such act, or allowed such act to have been committed, without legal justification; or

3. the publication or utterance of a libel or slander or a publication or an utterance in violation of a patient's right to professional confidence, except when published or uttered by, at the direction of, or with the consent or acquiescence of the Insured who has predetermined to commit such act, or allowed such act to have been committed, without legal justification.

F. **Professional Services** means those services described in Item 4. of the Declarations [i.e. "human, animal and plant DNA testing and expert witness services"].

[…]

(Exhibit "1," p. 2.)

20. The Policy's coverage is limited by the following pertinent exclusions:

THE EXCLUSIONS
This policy does not apply to:

A. any Claim based upon or arising out of any dishonest, fraudulent, criminal, malicious or knowingly wrongful acts, errors or omissions intentionally committed by or at the direction of the Insured;

> […]
> E. any Claim based upon or arising out of any liability assumed by the Insured in a contract or agreement; provided, however, this exclusion shall not apply to liability an Insured would have in the absence of the contract or agreement;
>
> […]

(Exhibit "1," pp. 2-3.)

21. The Policy also provides the manner in which claims are submitted to Evanston:

> **CLAIMS**
>
> A. **Claim Reporting Provision:** The Insured shall give to the Company written notice as stated in Item 13. of the Declarations[[1]] as soon as practicable of any Claim first made against the Insured during the Policy Period ….
>
> In the event suit is brought against the Insured, the Insured shall immediately forward to Markel Service, Incorporated, Ten Parkway North, Deerfield, Illinois, 60015, on behalf of the Company, every demand, notice, summons or other process received by him/her or by his/her representatives.
>
> […]
>
> C. **Assistance and Cooperation of the Insured:** The Insured shall cooperate with the Company …. The Insured shall … do whatever is necessary to secure and affect any right of indemnity, contribution or apportionment which the Insured may have. The Insured shall not, except at his/her own cost, make any payment, admit any liability, settle any Claims, assume any obligation or incur any expense without the written consent of the Company.
>
> […]

(Exhibit "1," p. 5.)

22. The Policy's **OTHER CONDITIONS** section states in its "B. **Representations**" paragraph that the Policy's terms are based on "the information and statements contained in the [insured's] application(s)" and that those application(s) "are

[1] Item 13. of the Declarations specifies where required notices to the insurer must be sent.

to be considered as incorporated into and constituting a part of this policy." The following paragraph, "C. **Entire Agreement**" states the "policy, the Declarations, the application(s) and any written endorsements attached hereto shall be deemed to be a single unitary contract." (Exhibit "1," p. 7.)

23. DNAS' insurance application describes its "operations, services, and procedures" as "reference lab for human paternity and animal genetics." By checking "no" to the applicable question, the application indicates that the insured is not involved in any drug testing. When asked to provide "the percentage of services provided for," the applicant insured only completed the "Other" category, indicating that 20% of their services were for "human paternity" and 80% of their services were for "animal breeder [sic]." The application subsequently denied involvement in "medical, genetic, and AIDS or drug research" and "manufacturing, dispensing, or testing pharmaceuticals." (Exhibit "2," DNAS Application, at pp. 1-2, attached hereto and incorporated herein.)

24. The DNAS Application does not reveal any facts or circumstances relating to DNAS' underlying dispute with Beus Gilbert. (See Exhibit "2," pp. 3-4.)

25. In response to the application question, "Is the Applicant or any person proposed for this insurance aware of any act, error, omission, fact, circumstance, or records request from any attorney which may result in a malpractice claim or suit?", the applicant insured marked, "No." (Exhibit "2," p. 4.)

26. The application was signed on August 30, 2011. (Exhibit "2," p. 4.)

27. The insured also completed the "Policyholder's Representation of Claims or Circumstances" on May 31, 2011, that stated,

> After reasonable inquiry the undersigned authorized agent of the insured represents that there are no claims or losses or any facts, circumstances, situations, incidents, conditions, defects, or suspected defects which might afford grounds for any claim and for which coverage may be afforded by the policy referenced above and any proposed endorsements other than that which has already been disclosed or reported to the insurer of its underwriting manager and the following.
>
> If none, check here [ ].

The box for "none" was checked. (Exhibit "3," Representation of Claims and Circumstances, attached hereto and incorporated herein.)

IV. THE UNDERLYING COUNTERCLAIM

28. Beus Gilbert's claim was first submitted in its Answer, Counterclaim and Third Party Petition, filed in the underlying action on or about December 13, 2011, and alleging causes of action against DNAS, some of its individual employees, and Dr. Shimasaki. Beus Gilbert subsequently filed a First Amended Answer, Counterclaim, and Third Party Petition on March 19, 2012. (*See, generally*, Exhibit "4," Beus Gilbert Am. Ans., Countercl., and 3d Party Pet., attached hereto, redacted as it was when filed, and incorporated herein, with non-redacted version filed under seal.) The amended counterclaim is the source of the claim arising in this Declaratory Action.

29. Summarily, Beus Gilbert's amended counterclaim alleges that Beus Gilbert retained DNAS for expert consulting and witness services in connection with the Utah litigation, requiring certain scientific laboratory testing and eventual expert reporting and testimony. Beus Gilbert's counterclaim then describes alleged deficiencies in DNAS' work in connection with the Utah litigation, culminating in Beus Gilbert's inability to "submit an expert report that would address the range of issues covered by [DNAS]" or

have another expert perform the experimentation that needed to be conducted. As a result of the deficiencies alleged against DNAS' work, Beus Gilbert's amended counterclaim alleges claims for breach of its expert services contract with DNAS, fraud arising from DNAS' representations that they would be capable of providing the expert services requested, and professional negligence arising from DNAS' failure to perform their expert services to the degree of care and skill normally exercised by professionals in their field.[2]

30. Through their own hired counsel, DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy filed their Answer to Beus Gilbert's claims on May 29, 2012. Three days later, on June 1, 2012, DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy, through counsel, demanded a defense of Beus Gilbert's claims from Evanston. (Exhibit "5," Ltr. from R. Haupt to Markel Svc. Inc. (June 1, 2012), attached hereto and incorporated herein.) After initial negotiation, DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy, through counsel, accepted a defense from Evanston under a reservation of rights (Exhibit "6," Ltr. from T. Cheek to R. Haupt (Oct. 8, 2012), redacted and incorporated herein, with non-redacted version filed under seal; Exhibit "7," Ltr. from R. Haupt to T. Cheek (Oct. 15, 2012, attached hereto and incorporated herein.)

[2] The majority of the specific facts raised in Beus Gilbert's Amended Counterclaim and Third Party Complaint are redacted from the document's public view and filed under the Court's seal. For that reason, the Court is directed to Exhibit "4" directly, as has been or will be filed under seal and as that exhibit is incorporated into this Complaint, for a complete recitation of the claims made against DNAS in the underlying action.

V. FIRST CLAIM FOR RELIEF

The Policy does not provide coverage for Beus Gilbert's allegations or claims because there was no "Professional Personal Injury".

31. The Policy only provides coverage for "Professional Personal Injur[ies]", which are specifically defined by the Policy's terms. (*See* Exhibit "1," p. 2.)

32. The amended counterclaim Evanston has been asked to defend does not claim any "Professional Personal Injury"; that is, Beus Gilbert's claims do not lie in bodily or mental injury, nor do they arise from any claim of false arrest or detention, nor do they arise from any liable, slander, or breach of professional confidence or malicious prosecution.

33. Consequently, Evanston does not owe any duty to defend or indemnity Defendant DNAS, its employees, or Dr. Shimasaki under the Policy.

VI. SECOND CLAIM FOR RELIEF

The Policy does not provide coverage because DNAS had knowledge of the facts that could result in Beus Gilbert's claims before the Policy's inception date.

34. The allegations of Beus Gilbert's claim state the facts and circumstances leading to its claim occurred between the approximate dates of December 2010, and August 2011.

35. The Policy's effective date was October 1, 2011, and DNAS submitted their application for the Policy on August 30, 2011, stating they had no knowledge of any facts or circumstances that could give rise to a claim against DNAS, its employees, or Dr. Shimasaki.

36. Beus Gilbert's allegations indicate DNAS had knowledge of the facts regarding the issues raised in Beus Gilbert claim prior to the effective date of the Policy.

37. The facts giving rise to Beus Gilbert's claim were not disclosed to the Plaintiff until after the effective date of the Policy.

38. Evanston has no duty to defend or indemnify under the Policy because DNAS had knowledge of facts giving rise to Beus Gilbert's claim before the Policy's effective date.

VII. THIRD CLAIM FOR RELIEF
DNAS did not provide timely notice to Plaintiff.

39. Beus Gilbert's claims were first presented on or about December 13, 2011. DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy did not present their claim for defense until June 1, 2012.

40. The delay in notifying Plaintiff of Beus Gilbert's counterclaim was not "as soon as practical" or "immediate."

41. Because the notice was not immediate, the Policy provides no coverage and Evanston owes no duty to defend or indemnify under it.

VIII. FOURTH CLAIM FOR RELIEF
Evanston has no duty to indemnify any Judgment entered against DNAS, Dr. Shimasaki, Dr. Kupiec and/or Dr. Cassidy arising from Beus Gilbert's fraud or breach of contract claims.

42. Beus Gilbert's claims allege causes of action for fraud and breach of contract.

43. The Policy contains exclusions for any claim "arising out of any dishonest, fraudulent, criminal, malicious or knowingly wrongful acts" and for any claim "based upon or arising out of any liability assumed by the Insured in a contract or agreement[.]"

44. In the event an award in entered in favor of Beus Gilbert and against

DNAS, Dr. Shimasaki, Dr. Kupiec, and/or Dr. Cassidy on Beus Gilbert's fraud or breach of contract causes of action, Evanston will not owe any duty to indemnify such claims.

IX. PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiff Evanston Insurance Company, Inc., prays the Court enter a declaration pursuant to 28 U.S.C. § 2201 holding, adjudging, and decreeing:

(a) that Policy No. SM-882480, issued to DNAS and Dr. Shimasaki, does not provide coverage for the claims asserted against DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy, by Beus Gilbert;

(b) that Evanston has no duty to defend or indemnify DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy for Beus Gilbert's claims alleged against them as described herein;

(c) that Evanston has no duty to indemnify DNAS, Dr. Shimasaki, Dr. Kupiec and Dr. Cassidy, for any claims arising from Beus Gilbert's fraud and beach of contract claims;

(d) and for such other and further relief pursuant to 28 U.S.C. § 2202 as the Court deems just and proper, along with the costs of this action.

Respectfully submitted,

EVANSTON INSURANCE COMPANY,

-- Plaintiff

By: /s/Tim N. Cheek
Tim N. Cheek – OBA #11257
D. Todd Riddles – OBA #15143

Gregory Winningham – OBA #22773
Tyler J. Coble – OBA #30526
CHEEK LAW FIRM, P.L.L.C.
311 North Harvey Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0621
Facsimile: (405) 232-1707
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012 (Date), I served the attached document by certified U.S. Mail, return receipt requested, upon the following, who are not registered participants of the ECF System: (insert names and addresses)

[No service at this time]

/s/Tim N. Cheek
Tim N. Cheek